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No. 91-1608

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

SAMUEL WINSTON, JR., a minor by his parents, MARYANNE AND SAMUEL WINSTON, SR. and MARYANNE WINSTON and SAMUEL WINSTON, SR.,
Petitioners and Cross-Respondents

v.

CHILDREN AND YOUTH SERVICES OF DELAWARE COUNTY, H. SCOTT CAMPBELL, SANDRA CORNELIUS, COUNTY OF DELAWARE and JOHN F. WHITE, JR..
Respondents and Cross-Petitioners

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CROSS-RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

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May 13, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners' claims challenging the constitutionality of a child welfare agency's visitation policy are moot due to the return of the minor child to the custody of his parent, or whether the case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine.

2. Whether Cross-Petitioners have waived the defense of abstention and, if not, whether the doctrine, as enunciated in Younger v. Harris, 401 U.S. 37 (1971), is applicable in this instance.

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STATEMENT OF THE CASE

Petitioners request this Court to refer to their Petition for Writ of Certiorari for a "Statement of the Case." Petitioners also wish to supplement that Statement to provide information particularly relevant to the issues of mootness and abstention raised in the instant Cross-Petition.

In their Answer to Petitioners' initial Complaint filed in the Eastern District Court of Pennsylvania, the County Defendants (Cross-Petitioners herein) first raised the issues of mootness and abstention as affirmative defenses. These Defendants later filed a Motion to Dismiss on the mootness issue, arguing that the return of the minor to his father on December 20, 1989 rendered Petitioners' claim moot. Abstention was not raised as an issue in that or any other motion. The Motion to Dismiss (for mootness) was denied by the District Court, and the trial proceeded

on the merits. By Order and Memorandum entered on September 25, 1990, the District Court ruled in favor of Defendants on the merits.

On October 24, 1990, Petitioners filed an appeal to the United States Court of Appeals for the Third Circuit. There was no cross-appeal. All parties submitted briefs to the Court. Cross-Petitioners did not raise the issues of mootness or abstention in their brief. Subsequent to the filing of these briefs, the Third Circuit requested supplemental briefs on these two procedural issues. On November 7, 1991, the Court of Appeals held that Petitioners' claims were not moot and that Cross-Petitioners had waived the defense of abstention. The Court proceeded to affirm the District Court's decision on the merits.

On November 21, 1991, Petitioners petitioned for a panel rehearing. On December 3, 1991, this petition was denied by the Court

of Appeals. On March 2, 1992, Petitioners filed a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, which was resubmitted pursuant to Court instructions, by letter dated April 3, 1992. On April 3, 1992, Cross-Petitioners filed the instant Writ of Certiorari, which was resubmitted pursuant to Court instructions, by letter dated April 13, 1992.

REASONS FOR DENYING THE WRIT

In their Cross-Petition for Writ of Certiorari, Cross-Petitioners raise the issues of mootness and abstention, both of which were addressed at length by the Court of Appeals. This Court should deny Cross-Petitioners' Writ, because the Third Circuit correctly analyzed both of these issues as a preliminary matter prior to reaching the merits of the appeal.

I. PETITIONERS' CLAIMS SHOULD NOT BE DISMISSED AS MOOT, BECAUSE THEY ARE "CAPABLE OF REPETITION YET EVADING REVIEW."

Cross-Petitioners argue that the Court of Appeals should have dismissed Petitioners' claim because the visitation practices of the child welfare agency (CYS) were rendered moot by the return of the minor child to the custody of his father. This Court should deny Cross-Petitioners' Writ because the Third Circuit correctly applied the exception to the mootness doctrine by determining that the controversy was "capable of repetition, yet evading review." See Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911).

In Honig v. Doe, 484 U.S. 305 (1988), this Court determined that part of the test to overcome mootness was "...whether the controversy was capable of repetition and not, ...whether the claimant had demonstrated that a recurrence of the dispute was more probable

than not." Honig, supra at 602, n.6. The Third Circuit in the case below correctly recognized that there was a reasonable possibility that the type of parental conduct that brought the minor into the protective custody of CYS in the first place would recur. (App. 8a).

The Third Circuit also recognized that the issue of CYS's visitation policy could evade review because of the short-term nature of foster care. (App. 9a). As noted by the Court, there were no statistics or other information of record in the case to demonstrate that other children have remained in foster care for a period of time long enough to effectively pursue a legal challenge to the CYS visitation policy. (App. 9a).

Because the Third Circuit correctly applied the exception to the mootness doctrine, this Court should deny Cross-Petitioners' Writ on that issue.

II. CROSS-PETITIONERS HAVE WAIVED THE DEFENSE OF ABSTENTION. EVEN IF THE DOCTRINE IS NOT WAIVED, THE FEDERAL COURT SHOULD NOT ABSTAIN IN THIS INSTANCE.

Cross-Petitioners argue that, pursuant to the Younger doctrine, the District Court should have abstained from hearing Petitioners' claims. The Third Circuit correctly determined that Cross-Petitioners had failed to preserve any claim for abstention. For that reason and because abstention is not appropriate, this Court should deny Cross-Petitioners' Writ on that issue.

As the Third Circuit stated, Cross-Petitioners waived the abstention issue at the Circuit Court level by not appealing from the District Court's failure to abstain, by failing to cross-appeal when Petitioners appealed from the adverse judgment, and by failing to

initially brief the issue.[1] See discussion at App. 10a-12a and Rule 28 (a)(4) of the Federal Rules of Appellate Procedure. Also see Brown v. Hotel Employees, 468 U.S. 491 (1984); McLaughlin v. Pernsley, 876 F.2d 308 (3d Cir. 1989) and Wisniewski v. Johns-Mansville Corp., 812 F.2d 81 (3d Cir. 1987). Because Cross-Petitioners waived the abstention defense at the Circuit Court level, there is no reason for this Court to address the issue.

In dicta, the Court of Appeals did discuss the merits of abstaining. The Court correctly determined that abstention was not appropriate, because the applicable state procedures did not afford the Petitioners the opportunity to raise all of their claims in the underlying state

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[1] The issue of abstention came before the Third Circuit only at the request of the Court itself. However, the Court's request that the parties file supplemental briefs on the issue did not overcome Cross-Petitioners' failure to preserve the defense. (See App. 12a).

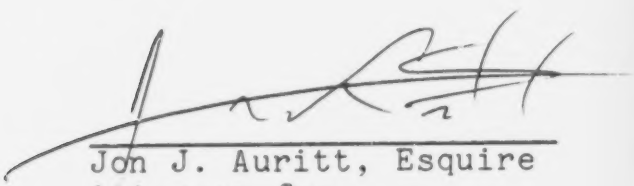
proceeding. See discussion at App. 13a-14a and Fawber v. Cohen, 532 A.2d 429 (Pa. 1987). Also see Norman v. Joseph, 739 F. Supp. 1182 (N.D. Ill. 1990) and Coleman v. Stanziani, 570 F. Supp. 679 (E.D. Pa. 1983).

Because Cross-Petitioners waived the issue and because abstention is not appropriate, this Court should deny Cross-Petitioners' Writ on that issue.

CONCLUSION

For the reasons detailed above, Cross-Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,



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